Supreme Court, U.S.
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No. 93-1141

In The

Supreme Court of the United States

October Term, 1993

DAWUD MAJID MU'MIN,

Petitioner,

v.

EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant certiorari to review Mu'Min's plethora of fact-specific ineffective assistance of counsel claims?

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STATEMENT OF THE CASE

This Court is already familiar with the facts of this case from its affirmance of the judgment of the Supreme Court of Virginia in Mu'Min's direct appeal:

> Mu'Min was an inmate at the Virginia Department of Corrections' Haymarket Correctional Unit serving a 48-year sentence for a 1973 first-degree murder conviction. On September 22, 1988, he was transferred to the Virginia Department of Transportation (VDOT) headquarters in Prince William County and assigned to a work detail supervised by a VDOT employee. During his lunch break, he escaped over a perimeter fence at the VDOT facility and made his way to a nearby shopping center. Using a sharp instrument that he had fashioned at the VDOT shop, Mu'Min murdered and robbed Gladys Nopwasky, the owner of a retail carpet and flooring store. Mu'Min then returned to his prison work crew at the VDOT, discarding his bloodied shirt and the murder weapon near the highway.

Mu'Min v. Virginia, 111 S.Ct. 1899 at 1901 (1991).

In August, 1992, Mu'Min filed in the Circuit Court for Prince William County a petition for writ of habeas corpus. After amending the petition in December, 1992, Mu'Min asserted 13 substantive claims and 9 claims of ineffective assistance of counsel, each of which was based on a motion, objection, or other request which Mu'Min contended counsel should have asserted in the trial court and preserved on direct appeal.

The circuit court found that none of Mu'Min's ineffective assistance of counsel claims stated facts which, if true, would support habeas corpus relief, and denied and

dismissed the habeas claims on their merits without an evidentiary hearing. The Supreme Court of Virginia affirmed the circuit court in an unpublished order.

ARGUMENT

I. NO ISSUE WORTHY OF THIS COURT'S REVIEW ON CERTIORARI IS PRESENTED BY THE STATE COURT'S REJECTION OF MU'MIN'S HABEAS PETITION.

Mu'Min's claims do not present "special and important reasons" for this Court to exercise its certiorari powers. Certiorari will be granted only when such reasons are present. Sup.Ct.R. 10.1. This Court does not exercise its certiorari power merely to review perceived error. *See Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974); *see also United States v. Johnston*, 268 U.S. 220 (1925) (Court does not grant certiorari to review evidence and discuss specific facts).

II. TRIAL DEFENSE COUNSEL HAD NO REASON TO BELIEVE THAT MU'MIN WOULD BE BENEFITTED BY ANY OF THE CLAIMS WHICH MU'MIN NOW SAYS COUNSEL SHOULD HAVE ASSERTED.

The state courts correctly rejected Mu'Min's ineffective assistance of counsel claims, finding no substantive merit in any of the underlying motions or objections which Mu'Min now claims counsel should have made. Counsel cannot be held ineffective for failing to raise a

meritless or groundless motion or objection. *See Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986); *Washington v. Murray*, 952 F.2d 1472, 1481 (4th Cir. 1991); *Lindsey v. Smith*, 820 F.2d 1135, 1152 (8th Cir. 1987); *see also Lockhart v. Fretwell*, 113 S.Ct. 838, 842-43 (1993).

Essentially, Mu'Min contends that counsel was ineffective for failing to urge upon the trial court and the Supreme Court of Virginia on direct appeal various expansions, modifications, or reversals of existing case law, none of which has been accepted by this Court or by the Virginia courts even as of February 1994. The Sixth Amendment, however, does not require that counsel be a visionary, or that counsel exercise clairvoyance in foreseeing distant future changes in the law. Mu'Min's trial defense counsel exercised reasonable trial strategy, and selectively pursued those points which they reasonably deemed would most likely be of benefit to their client. *See Jones v. Barnes*, 463 U.S. 745, 751-52 (1983); *Engle v. Isaac*, 456 U.S. 107, 134 (1981). The soundness of their judgment in this regard is demonstrated by their success in crafting and preserving a claim on direct appeal which this Court deemed worthy of its rare grant of certiorari review.

A. COUNSEL'S ELECTION NOT TO APPEAL THE DENIAL OF CHANGE OF VENUE

In affirming Mu'Min's conviction and sentence of death on certiorari review of his direct appeal, this Court contrasted the pre-trial publicity in this case and that in *Irvin v. Dowd*, 366 U.S. 717 (1961), in which a change of venue was held constitutionally required: "While news reports about Mu'Min were not favorable, they did not

contain the same sort of damaging information [as those reflected in *Irvin*]." *Mu'Min v. Virginia*, 111 S.Ct. at 1907.

This Court has consistently held that, in evaluating the impartiality of the jurors who try a defendant and the venire from which they are chosen,

> we must distinguish between mere familiarity with the petitioner or his past and an actual disposition against him, just as we have in the past distinguished largely factual publicity from that which is invidious or inflammatory.

Murphy v. Florida, 421 U.S. 794, 800 n.4 (1975). Moreover, this Court found a marked contrast between the attitudes of members of the venire in this case and those in *Irvin*, where a change of venue was required:

> In the present case, eight of the twelve jurors who sat answered that they had read or heard something about the case, but none of those eight indicated that he had formed an opinion as to guilt, or that the information would affect his ability to judge petitioner solely on the basis of the evidence presented at trial.

Mu'Min v. Virginia, 111 S.Ct. at 1907.

For these reasons, an appeal based upon the trial court's denial of a change of venue would have been meritless, and counsel clearly exercised sound professional judgment in electing not to raise such a claim on direct appeal. *See Jones v. Barnes*, 463 U.S. at 751-52.

B. COUNSEL'S ELECTION NOT TO REQUEST AN ADDITIONAL LIMITING INSTRUCTION CONCERNING CONSIDERATION OF MU'MIN'S PREVIOUS MURDER CONVICTION

Evidence that Mu'Min was serving a 48-year sentence for first degree murder at the time he escaped and committed the instant crime was properly admitted, both to document his status as a correctional prisoner, and as an integral part of his conversation with police investigator Watson, voluntarily offered by Mu'Min to explain why he did not stay or call for assistance when, as he claimed in his initial statement to the police, he supposedly found the victim *in extremis* after having been stabbed by someone else. *See Mu'Min v. Commonwealth*, 239 Va. 443, 445-47, 389 S.E.2d 886, 894-95 (1990).

At the conclusion of the trial, the Court gave the following instruction to the jury:

> You may consider proof of the defendant's prior conviction of a felony as affecting his credibility, but it does not render him incompetent to testify, nor should you consider it as evidence of his guilt of the offense for which he is on trial.

The state courts properly held that Mu'Min failed to overcome the strong presumption that counsel exercised reasonable professional judgment in failing to request an additional jury instruction on this subject. *See Darden v. Wainwright*, 477 U.S. 168, 186 (1986); *Engle v. Isaac*, 456 U.S. at 134.

C. ABSENCE OF ADDITIONAL MITIGATION INSTRUCTIONS

The penalty phase instructions given at Mu'Min's trial are reprinted at pp. A-1 through A-3 of the appendix to this brief.

Counsel certainly was not required by reasonable professional standards to request an additional jury instruction concerning mitigating evidence. The Constitution does not require a state to adopt special standards in instructing the jury on mitigation, *Zant v. Stephens*, 462 U.S. 862, 890 (1983), and an explicit mitigation instruction is not required so long as the defendant's mitigating evidence was within the effective reach of the sentencer. *Johnson v. Texas*, 113 S.Ct. 2658, 2669 (1993). The standard penalty instructions used in this case have been repeatedly upheld as complying with constitutional requirements. *See, e.g., Pruett v. Thompson*, 996 F.2d 1560, 1577 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 487 (1993); *Jones v. Murray*, 947 F.2d 1106, 1119-20 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 1591 (1992); *Briley v. Bass*, 750 F.2d 1238 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985). This Court's prior denials of certiorari review of this issue are "ample evidence" that it is not worthy of such review. *Maggio v. Williams*, 464 U.S. 46, 51-52 (1983).

D. REASONABLE DOUBT INSTRUCTION

The "reasonable doubt" instruction which Mu'Min claims was defective is reprinted at p. A-4 of the appendix to this brief.

Counsel had no reason to object to the reasonable doubt instruction given. Mu'Min's reliance on *Cage v. Louisiana*, 111 S.Ct. 328 (1990), is misplaced. This Court's disapproval of the instruction given in *Cage* focused on the portions thereof which equated reasonable doubt with "grave uncertainty" and "actual substantial doubt," and equated proof beyond a reasonable doubt with proof to a moral certainty. 111 S.Ct. at 329-30. The instruction given in Mu'Min's trial suffered none of these infirmities. It used standard language which the Supreme Court of Virginia had described as "properly balanced . . . as to what constitutes proof beyond a reasonable doubt." *O'Dell v. Commonwealth*, 234 Va. 672, 699, 364 S.E.2d 491, 506 (1988), *cert. denied*, 488 U.S. 871 (1988).

È. "VILENESS" INSTRUCTION CONCERNING DEPRAVITY OF MIND

Neither was counsel ineffective for failing to maintain that the penalty instruction would unjustifiably permit the jury to base a sentence of death based on Virginia's "vileness" predicate upon a finding of "depravity of mind." "Depravity of mind" was defined for the jury as "a degree of moral turpitude or psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation."

The evidence showed that, after ripping his victim's clothes off, beating her face until it was unrecognizable, stabbing or slashing her 16 times, wiping his fingerprints from surfaces at the scene, and leaving her to die in a puddle of blood on the floor of her family-owned business, Mu'Min attempted to justify his actions with the

scurrilous claim that his victim, a middle-aged wife and mother, instigated the altercation which led to her death after Mu'Min rejected her sexual advances. On this record, Mu'Min submits to this Court that "there was no evidence that Mu'Min was depraved." (Pet. for cert., pp. 32-33).

Even if this proposition were not contrary to common sense, common decency, and Virginia law,[1] Mu'Min's claim would not establish ineffective assistance of counsel. Had counsel successfully objected to the inclusion of the "depravity of mind" alternative in the penalty instruction, there is nevertheless no reasonable likelihood that the jury would have failed to find "vileness" based solely on the aggravated battery which the evidence so clearly established, and Mu'Min has thus not been prejudiced by counsel's alleged failing in this regard. *See Strickland v. Washington*, 466 U.S. 668, 693-94 (1984).

F. JURY VERDICT FORM

Counsel had no grounds to object to the jury verdict forms. The Virginia jury verdict forms, which are reprinted at pp. A-3 and A-4 of the appendix to this brief, have repeatedly been held to give the jury ample opportunity to give effect to mitigating evidence by declining to impose the death penalty. *See, e.g., Clanton v. Muncy*, 845 F.2d 1238, 1242 (4th Cir. 1988), *cert. denied*, 485 U.S. 1000 (1988); *Mueller v. Commonwealth*, 244 Va. 409, 412-13,

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[1] Depravity of mind can be shown by lack of remorse. *See Thomas v. Commonwealth*, 244 Va. 1, 23-24, 419 S.E.2d 606 (1992), *cert. denied*, 113 S.Ct. 421 (1992).

422 S.E.2d 380, 394 (1992), *cert. denied*, 113 S.Ct. 1880 (1993); *Watkins v. Commonwealth*, 229 Va. 469, 490-91, 331 S.E.2d 422, 438 (1985), *cert. denied*, 475 U.S. 1111 (1985).

G. JURY QUESTION ABOUT THE MEANING OF A LIFE SENTENCE

During deliberations after the penalty trial, the jury submitted the following written question to the trial court: "We understand the death penalty. However, what exactly is life imprisonment?" The trial court answered in writing, "I am sorry; I cannot answer that question. Neither should you be concerned about it. [Judge's initials]."

Mu'Min's attempt to torture this response into a message that the jury's decision regarding the defendant's life was unimportant, or that life imprisonment was an improper penalty for him (Pet. for cert., p. 35, n.11) is absurd. The obvious import of the question was to ask the Court whether the legal effect of a "life sentence" was anything other than what the plain meaning of the words would convey, *i.e.*, that the defendant would be confined for the rest of his natural life.

Virginia law has long prohibited the trial court or counsel in a criminal case from presenting the jury who must sentence the defendant with any suggestion that the sentence which they deem appropriate may be reduced by the action of the executive branch of government through the Parole Board. *See generally Ramdass v. Commonwealth*, ___ Va. ___, ___, 437 S.E.2d 566, 573 (1993); *Mueller*, 244 Va. at 409, 422 S.E.2d at 394; *Stamper v. Commonwealth*, 220 Va. 260, 278, 257 S.E.2d 808, 821

(1979), *cert. denied*, 445 U.S. 972 (1980); *Hinton v. Commonwealth*, 219 Va. 492, 495-96, 247 S.E.2d 704, 706 (1978); *Peterson v. Murray*, 904 F.2d 882, 886 (4th Cir.), *cert. denied*, 111 S.Ct. 537 (1990); *Turner v. Williams*, 812 F.Supp. 1400, 1437 (E.D. Va. 1993). No existing precedent from this Court, or from the United States Court of Appeals for the Fourth Circuit, has ever required a contrary practice.

Regardless of this Court's pending decision in the case of *Simmons v. South Carolina*, No. 92-9059, then, it was well "within the range of competence demanded of attorneys in criminal cases," *Hill v. Lockhart*, 474 U.S. 52, 55 (1985), *quoting McMann v. Richardson*, 397 U.S. 759 at 771 (1970), for counsel to act in reliance on the state of the law at the time of Mu'Min's trial. He was not required to exercise clairvoyance by anticipating the possibility that a long-standing precedent might be overturned. *See Honeycutt v. Mahoney*, 698 F.2d 213 (4th Cir. 1983). Likewise, counsel was not required to recognize and raise every conceivable claim in Mu'Min's trial. *Engle v. Isaac*, 456 U.S. at 134.

Moreover, an explicit answer to the jury's question would have required disclosing that Mu'Min would not necessarily be confined for life, and might be paroled after 25 years. Va. Code § 53.1-151C (Cum. Supp. 1988). Counsel could reasonably have felt that such an answer would do more harm than good, and could have elected as a tactical matter not to object to the answer which the Court gave. Mu'Min's allegations have thus not overcome the strong presumption that counsel exercised reasonable professional judgment. *See Darden v. Wainwright*, 477 U.S. 168, 186 (1986).

H. "FUTURE DANGEROUSNESS" PREDICATE

Virginia's "future dangerousness" predicate has been consistently upheld against vagueness challenges such as Mu'Min contends counsel should have made. *See Spencer v. Murray*, 5 F.3d 758, 764-65 (4th Cir., Sept. 16, 1993); *Giarratano v. Procunier*, 891 F.2d 483, 489-90 (4th Cir. 1989), *cert. denied*, 498 U.S. 881 (1990); *Briley v. Bass*, 750 F.2d 1238, 1245 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985). There is nothing unconstitutional in calling upon a sentencing jury to predict the defendant's likely future dangerousness. *See Barefoot v. Estelle*, 463 U.S. 880 (1983); *Jurek v. Texas*, 428 U.S. 262, 274-76 (1976).

CONCLUSION

In the smorgasbord of claims which Mu'Min now urges that counsel should have made in his trial and direct appeal, there is not a single motion or objection which counsel had any reason at the time of Mu'Min's trial to believe would succeed or would benefit Mu'Min in any way. At best, these assertions would have been feckless distractions from those points which counsel reasonably felt could have benefitted Mu'Min, including the claim crafted and preserved by defense counsel which this Court deemed worthy of certiorari review; at worst, some of these claims could have detracted from counsel's trial strategy or emphasized unfavorable aspects of the case in the minds of the jurors. Counsel was not ineffective for failing to make any of these claims. For the foregoing reasons, Edward W. Murray respectfully

requests that this Court will deny the petition for writ of certiorari.

Respectfully submitted,

EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF
CORRECTIONS

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INSTRUCTION NO. 1

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at lest one of the following two alternatives:

1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or

2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.

If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment.

INSTRUCTION NO. 2

Depravity of mind means a degree of moral turpitude and psychical debasement surpassing that inherent in the definition or [sic] ordinary legal malice and premeditation.

INSTRUCTION NO. 3

Aggravated battery means a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.

INSTRUCTION NO. 6

The defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been indicted and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However, suspicion or probability of guilt is not enough for a conviction.

There is no burden on the defendant to produce any evidence.

A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case.

We, the jury, on the issue joined having found the defendant, DAWUD MAJID MU'MIN, a/k/a, DAVID MICHAEL ALLEN, GUILTY of Capital Murder of Gladys Keene Nopwasky,

in that;

1. the killing was committed while defendant was confined in a State Correctional Facility or while in the custody of an employee thereof;

and

2. that the killing occured during the commission of robbery while the defendant was armed with a deadly weapon,

and

A. having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society,

and/or

B. having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder

(Strike out A or B, of either you do not unanimously find.)

and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

/s/ Amos Stuart, Jr.
FOREPERSON

Commonwealth of Virginia
vs.
Dawud Majid Mu'Min
a/k/a David Michael Allen
Criminal Number 23103

April 24, 1989

WE, the jury, on the issue joined, having found the defendant, DAWUD MAJID MU'MIN, a/k/a, DAVID MICHAEL ALLEN, GUILTY of Capital Murder of Gladys Keene Nopwasky, in that; 1. the killing was committed while defendant was confined in a State Correctional Facility or while in the custody of an employee thereof; and 2. that the killing occurred during the commission of robbery while the defendant was armed with a deadly weapon, and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

_____
FOREPERSON

Commonwealth of Virginia

vs.

Dawud Majid Mu'Min
a/k/a David Michael Allen

Criminal Number 23103

April 24, 1989